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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92063687
Party	Defendant Terra Holdings, LLC
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Submission	Answer and Counterclaim
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Signature	/Joseph Sofer/
Date	07/20/2016
Attachments	ANSWER AND COUNTERCLAIMS AND EXHIBITS 7-20-16.pdf(4151810 bytes

Registration Subject to the filing

Registration No	2011510	Registration date	10/29/1996
Registrant	VANDERBILT MORTGAGE A 500 ALCOA TRAIL MARYVILLE, TN 37804 UNITED STATES	AND FINANCE, INC.	

Goods/Services Subject to the filing

Class 036. First Use: 1977/06/00 First Use In Commerce: 1977/06/00

All goods and services in the class are requested, namely: financing services for purchasers of manufactured homes

Grounds for Cancellation

Abandonment	Trademark Act Section 14(3)
Fraud on the USPTO	Trademark Act Section 14(3); In re Bose Corp., 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

VANDERBILT MOR		71	
FINANCE, INC.,		:	
		:	
	Petitioner and		
	Counter-Registrant	:	
		:	
		:	Cancellation No. 92063687
v.		:	
		:	Registration Nos. 4678115, 4674773, 4678715
TERRA HOLDINGS,	LLC	:	
		:	
	Registrant and		
	Counter-Petitioner.	:	
		:	
		:	
		:	
		X	

REGISTRANT'S ANSWER TO PETITION FOR CANCELLATION AND COUNTERCLAIMS

Registrant, Terra Holdings, LLC, by and through its undersigned counsel, hereby responds to the petition for cancellation as follows:

- 1. Registrant is without knowledge or information sufficient to form a belief as to paragraph 1 of the petition for cancellation.
- 2. Registrant admits the allegations in paragraph 2 of the petition for cancellation.
- 3. Registrant admits the allegations in paragraph 3 of the petition for cancellation to the extent that the registration identifies a date of first use of at least as early as May 2004. Registrant otherwise denies the remaining allegations.

- 4. Registrant admits the allegations in paragraph 4 of the petition for cancellation to the extent that the registration identifies a date of first use of at least as early as May 2000. Registrant otherwise denies the remaining allegations.
- Registrant admits the allegations in paragraph 5 of the petition for cancellation to
 the extent that the registration identifies a date of first use of at least as early as 1999.
 Registrant otherwise denies the remaining allegations.
- 6. Registrant admits that Petitioner owns Registration No. 2,011,510 for use with "financing services for purchasers of manufactured homes," issued on October 29, 1996. Registrant is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 6 of the petition for cancellation.
- 7. Registrant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 7 of the petition for cancellation.
- 8. Registrant denies the allegations of paragraph 8 of the petition for cancellation.
- 9. Registrant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 9 of the petition for cancellation.
- 10. Registrant denies the allegations of paragraph 10 with respect to inherent distinctiveness and is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 10 of the petition for cancellation.
- 11. Registrant denies the allegations of paragraph 11 of the petition for cancellation.
- 12. Registrant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 12 of the petition for cancellation.
- 13. Registrant denies the allegations of paragraph 13 of the petition for cancellation.

- 14. Registrant denies the allegations of paragraph 14 of the petition for cancellation.
- 15. Registrant admits the allegations of paragraph 15 of the petition for cancellation to the extent that on at least two occasions the Trademark Office found the marks similar. However on three occasions, the Trademark Office did not deem the Petitioner's mark similar to Registrant's marks.
- 16. Registrant admits the allegations of paragraph 16 to the extent that Registrant filed U.S. Application Serial No. 76/302,815 on August 6, 2001, seeking to register VANDERBILT PROPERTIES INSURANCE for use with "insurance brokerage services in the field of luxury residential properties and commercial properties, directors' and officers' insurance and commercial general liability and umbrella insurance." The application was rejected in view of Petitioner's '510 registration. The '815 application was subsequently abandoned. Registrant denies the remaining allegations.
- 17. Registrant admits the allegations of paragraph 17 to the extent that Registrant filed U.S. Application No. 76/288,429 on July 18, 2001 seeking to register VANDERBILT FINANCIAL SERVICES for use with "mortgage brokerage services for purchasers of luxury residential properties" and that this application was rejected by the Trademark Office. Registrant subsequently abandoned the mark for reasons unrelated to the rejection.
- 18. Registrant admits that Petitioner filed U.S. Application No. 86/432,240 on
 October 23, 2014, seeking to register VANDERBILT EXPRESS & Design for use
 with "Providing internet based data capture services that enable the exchange of

information via the internet from residential mortgage borrowers to institutions for use in loan workouts; Online loan services" and that the '240 application was rejected by the Trademark Office based on a determination that the mark was confusingly similar to Registrant's. Registrant is without knowledge or information sufficient to form a belief as to the remaining allegations and denies the remaining allegations of paragraph 18 of the petition for cancellation.

19. Registrant denies the allegations of paragraph 19 of the petition for cancellation.

<u>AFFIRMATIVE DEFENSES</u>

The petition for cancellation, although crafted to appear valid, is based on statements taken out of context and references to rights that do not exist.

A. ABSENCE OF A LIKELIHOOD OF CONFUSION DUE TO ADMISSIONS AGAINST INTEREST

- 20. In April 2008, Vanderbilt University initiated an Opposition Proceeding No.91183673 against Petitioner on the grounds that Petitioner's Vanderbilt & Design
 - mark Vanderbilt closely resembles Vanderbilt University's marks as to be likely to cause confusion with consequent injury to Vanderbilt University and the public.

 (Exhibit A: Notice of Opposition, Page 10, Paragraph 25)
- 21. Vanderbilt University also initiated a Cancellation Proceeding No. 92052890 on August 12, 2010 on the grounds that Petitioner's mark creates a false association between itself and Vanderbilt University and the Vanderbilt family.

- In June 2011, the Opposition Proceeding No. 91183673 and Cancellation
 Proceeding No. 92052890 were consolidated.
- 23. In August 2010, Vanderbilt University filed a Motion for Summary Judgment claiming that the *du Pont* factors weigh in favor of a finding of likelihood of confusion between Petitioner's mark and the Vanderbilt University marks.
- 24. In its Brief in Support of the Motion for Summary Judgment, Vanderbilt

 University asserted that there is a close relationship between the University's services
 and Petitioner's services. Specifically, Vanderbilt Employees' Credit Union offered
 financing services including consumer loans since 1959. The Vanderbilt University

 Office of Student Financial Aid offered student loans and scholarships and the

 University offered students and staff debit card type services in the form of meal
 cards. (Exhibit B: Brief in Support of Opposer Vanderbilt University's Motion for
 Summary Judgment, Page 16)
- 25. Petitioner, in response to the University's arguments with regard to the relationship between the services, argued before the TTAB that "in a realistic appraisal of these goods and services, it is apparent that none of the items so described by opposer are in any way, related to financing services for purchasers of manufactured homes of the type sold by Applicant." (Exhibit C: Applicant's Response in Opposition to Opposer's Motion for Summary Judgment and Applicant's Cross-Motion for Summary Judgment, Page 14)
- 26. Petitioner further stated that the services described by Vanderbilt University are

- "simply normal and expected services offered by a higher education institution and are not similar to Applicant's *financing services relating to manufactured homes*." (Exhibit C, Page 15)
- 27. Petitioner emphasized that "even if the Credit Union's services were relevant, the Credit Union does not offer any financing services *related to manufactured homes...* which *does not include manufactured homes.*" (Exhibit C, Page 16)
- 28. Petitioner has previously admitted that its services are limited to the realm of manufactured homes and as such there is no likelihood of confusion between its Vanderbilt mark and Vanderbilt University due to the disparate nature of the services offered.
- 29. For the same reason, and based on Petitioner's admission that its services are to be limited to *financial services for purchasers of manufactured homes* there is no likelihood of confusion between its Vanderbilt mark and Registrant's marks for appraisal and insurance services.
- 30. With regard to another *du Pont* factor, Petitioner argued before the TTAB that there is significant third party usage of the Vanderbilt name and cited at least 37 federal registrations and 2 pending applications. (*Exhibit C, Page 20*)
- 31. Petitioner represented to the TTAB that "in view of the significant third party usages of Vanderbilt marks, it is reasonable to conclude that consumers have become conditioned to recognize that many entities use such terms." (*Exhibit C, Page 20*)
- 32. Petitioner represented to the TTAB that consumers will distinguish between its mark and other registered Vanderbilt composite marks easily. (*Exhibit C*, Page 20)

- 33. In direct contradiction of its previous admission to the TTAB, Petitioner now asserts that Registrant's registrations for composite Vanderbilt marks should be cancelled due to a likelihood of confusion with Petitioner's registration.
- 34. To further bolster, its arguments based on significant third party usage of the "Vanderbilt" name, Petitioner asserted before the TTAB that a simple search on the GOOGLE search engine revealed dozens, if not hundreds of other entities using various Vanderbilt names and marks. (*Exhibit C*, Page 20)
- 35. Petitioner stated that there were significant common law usages of the Vanderbilt name, including eleven entities that do not have federal registrations and included documents referencing these marks in its Ex. G. (*Exhibit C*, Page 20)
- 36. One example that Petitioner attached in its Exhibit G in support of its argument that there can be no likelihood of confusion due to the numerous third party common law uses of the Vanderbilt mark was Registrant's brochure for its Vanderbilt Insurance Program. (*Exhibit D*).
- 37. The attached brochure prominently displayed Registrant's VANDERBILT PROPERTIES INSURANCE BROKERAGE mark, the exact mark which Petitioner is attempting to cancel in the current Cancellation Action. (*Exhibit D*).
- 38. Therefore, Petitioner admitted to the TTAB that there is no likelihood of confusion between its mark and Registrant's mark as Registrant's mark was one of the many third party usages of the Vanderbilt name of which consumers have come to distinguish between.

B. ABSENCE OF LIKELIHOOD OF CONFUSION DUE TO LEGAL

BARRIER TO ZONE OF NATURAL EXPANSION

- 39. The Petitioner fails by reason of the fact that the Registrant's mark would not be recognized as suggesting a connection between Registrant and Petitioner since there is a legal barrier preventing the services offered by the parties from emanating from the same source.
- 40. With regard to the VANDERBILT APPRAISAL COMPANY mark, there is a bar against a market interface with Petitioner's financial services. The Home Valuation Code of Conduct isolates parties with financial interest in a mortgage loan transaction from appraiser selection and retention.
- 41. With regard to the VANDERBILT PROPERTIES INSURANCE BROKERAGE mark, at the time Registrant began use of this mark in at least as early as 1999, there was a legal barrier to market interface. The Glass-Steagall Act of 1933 set up barriers in the market among banking companies, securities companies and insurance companies that prohibited any one institution from acting as any combination of an investment bank, a commercial bank and an insurance company.
- 42. The legal barriers against market interface preclude Petitioner from claiming that the appraisal and insurance industry are within its natural zone of expansion.

C. <u>LACHES AND ESTOPPEL</u>

- 43. Petitioner is barred from seeking cancellation of the Registrant's trademarks under the doctrine of laches.
- 44. Registrant has been using its mark and developing consumer recognition and goodwill therein since at least 1995.

- 45. In October 2010, Petitioner in a prior Opposition Proceeding No. 91183673 provided the TTAB with an Exhibit G which contained a copy of Registrant's brochure for its Vanderbilt Insurance Program. (*Exhibit D*).
- 46. The attached brochure prominently displayed Registrant's VANDERBILT PROPERTIES INSURANCE BROKERAGE mark, the exact mark which Petitioner is attempting to cancel in the pending Cancellation Action. (*Exhibit D*).
- 47. Petitioner therefore, had actual knowledge of Registrant's mark since at least as early as 2010 when it submitted Registrant's brochure to the TTAB. In fact, not only Petitioner was aware of Registrant's use, it publicly presented to the TTAB that it did not deem such use confusingly similar to Petitioner's own trademark.
- 48. During the six years which have elapsed, Petitioner failed to take action to assert the claims on which it bases this Cancellation, on which inaction Registrant has relied to its detriment.

D. <u>UNCLEAN HANDS</u>

49. The Petitioner is barred by unclean hands based on fraudulent maintenance of a registration.

E. <u>ABANDONMENT</u>

50. The Petitioner fails by reason of the fact that Petitioner's alleged registration is unenforceable and abandoned based on a material alteration of the mark with discontinued use of the mark in the original form.

F. ABSENCE OF LIKELIHOOD OF CONFUSION DUE TO CONCURRENT

USE

51. The Petitioner fails by reason of the fact that Registrant has extensively used its mark in commerce for almost twenty years, and as such has not caused members of the public to believe that there is a connection between Registrant and Petitioner.

G. ABSENCE OF LIKELIHOOD OF CONFUSION

- 52. The Petitioner fails by reason of the fact that the marks are different in sight, sound, meaning and commercial impression.
- 53. Petitioner, in differentiating its mark from Vanderbilt University's marks in a prior Opposition Proceeding No. 91183673 argued that "the marks used by Opposer and Applicant are similar only to the extent that they both use the 'Vanderbilt' name. However, the words, phrases and distinctive logos used by Opposer and Applicant in conjunction with the Vanderbilt term reveal substantial differences in the marks."
 (Exhibit C, Page 13)
- 54. Along the same lines, Petitioner's mark in the '510 registration is also only similar to Registrant's marks to the extent that they both use the "Vanderbilt" name. However, the remaining distinctions among the marks allow consumers to distinguish between the entities.
- 55. The Petitioner fails by reason of the fact that the services of the parties are unrelated and marketed through different channels of trade.
- 56. Petitioner, in differentiating its mark from Vanderbilt University's marks in a prior Opposition Proceeding No. 91183673 argued that its services are limited to

- "financial services for purchasers of manufactured homes." (Exhibit C, Pages 15-16)
- 57. Registrant does not offer any financing services *related to manufactured homes*.

 Rather Registrant's marks cover home appraisal services and insurance brokerage in the field of commercial and personal excess liability insurance and home and property insurance.
- 58. Petitioner's services are primarily offered through manufactured home dealerships.

 Registrant's services are offered to the general public through its agents, and through its contacts with owners, managers and developers of commercial and residential real estate.
- 59. The Petitioner fails by reason of the fact that the parties' services are sold to different classes of consumers.
- 60. Registrant's typical customers are either purchasers of high end real estate such as real estate located in metropolitan New York City area or multifamily residential and commercial building owners in the New York City area and across the country.

 Registrant has no involvement with manufactured homes, nor does it focus on individual customers in semi-rural areas. While, Petitioner's consumers are purchasers of manufactured homes.
- and entitled only to a narrow scope of protection due to the numerous third party usages of the "Vanderbilt" name as well as the fact that Vanderbilt is a historical surname. Petitioner cannot monopolize such a historical surname since the surname is known to the large majority of Americans and that as a consequence, it serves as a convenient designation or trade name for business, commercial and social groups.

- 62. The Petitioner fails by reason of the fact that there is no evidence of actual confusion despite the opportunity for confusion to arise in the marketplace.
- 63. Petitioner and Registrant have concurrently used their respective Vanderbilt marks for 20 years. Despite the extensive concurrent use, there have not been any instances of actual confusion between the customers. The lack of evidence of actual confusion weighs strongly against a finding of likelihood of confusion between the two marks.
- 64. The Petitioner fails by reason of the fact that the purchasers of the involved services are sophisticated and therefore less apt to be confused by similar marks.
- 65. The involved customers are not making impulse decisions in a crowded retail environment. Registrant's consumers are either individual purchasers and lenders for expensive urban property, or owners or managers of commercial or multi-family properties with high valuation. They do not make appraisal or insurance decisions based on snap name recognition. Likewise, Petitioner's purchasers are engaged in securing financing for the purchase of a home and such consumers would be expected to exercise a very high degree of care when making these decisions.

H. <u>ADDITIONAL AFFIRMATIVE DEFENSES</u>

66. Registrant reserves the right to assert such other and further defenses, including, but not limited to affirmative defenses, as it may become aware of in the course of this proceeding.

COUNTERCLAIM TO CANCEL REGISTRATION DUE TO ABANDONMENT

- 67. Registrant repeats and re-alleges each and every allegation set forth in the foregoing paragraphs as if fully set forth herein.
- 68. Registrant hereby seeks cancellation of Petitioner's Registration (Registration No. 2,011,510) issued October 29, 1996 for the mark Vanderbilt and Design in International Class 36 for the application filed April 19, 1995.
- 69. In Opposition Proceeding No. 91183673, Petitioner expressly stated and admitted that "in 2006, Petitioner made a strategic decision to update certain marks used by the companies, including the VANDERBILT mark. Petitioner began using an updated version of its Vanderbilt



mark, in commerce at least as early as April 3, 2007 and has continued using the updated mark to the present. (*Exhibit E, Vanderbilt Mortgage and Finance's Motion for Summary Judgment* Page 4)

- 70. Petitioner complied with the strategic decision as evidenced by Petitioner's present website. (*Exhibit F*)
- 71. Since at least as early as 2007, Petitioner has stopped using its registered Vanderbilt and



Design mark (the '510 Registration

) and has substituted a new Vanderbilt



and Design mark in its place,

Registrant attaches as Exhibit G selections

from the WayBack Machine archives showing the explicit change in Vanderbilt logos from 2007 until the present. (*Exhibit G*)

72. In its Answer to Notice of Opposition filed on May 30, 2008 in Opposition No. 91183673, Petitioner attempted to claim priority for its updated



to its '510 registration. Petitioner stated, "Applicant admits

that the claimed date of first use of the mark

April 3, 2007. However, Applicant has used various other marks containing the term

VANDERBILT as the dominant portion thereof for over thirty years, including use of
the incontestably federally registered Reg. No. 2,011,510 in commerce substantially
continuously since at least as early as 1977 for the services stated therein." (Exhibit

H, Answer Page 3, Paragraph 16)

73. Petitioner also attempted to benefit from the '510 registration on behalf of its

updated mark, Vanderbilt when Petitioner filed a Motion for Summary Judgment in December 2009 asserting the Morehouse defense and claiming that "an opposition should be summarily dismissed when it is shown that the registration being opposed is being sought for a mark that is substantially the same as a mark already incontestably registered for the same services. If the opposer is not damaged by the mark already registered, it cannot be damaged by issuance of a second registration to the same party for substantially the same mark for the same services." (Exhibit E, Page 5)

74. In a Board decision issued on May 11, 2010, the Board decided as a matter of law that the '510 registered Vanderbilt and Design mark Vanderbilt and the updated Vanderbilt and Design

mark vanderbilt are distinctively different and leave different commercial impressions.

The Board stated that the "registered mark projects the bold impression of the letter 'V' and the name 'Vanderbilt,' whereas, the design of the applied for mark (vanderbilt) brings to mind an image that is suggestive of a home. There are no trifling differences, requiring careful inspection to detect them." (Exhibit I, Board's Decision on Vanderbilt Mortgage and Finance's Motion for Summary Judgment Pages 8, 10).

- 75. Therefore, Petitioner cannot claim any benefit on behalf of its updated Vanderbilt logo
 - Vanderbilt to its '510 registration Vanderbilt as the marks are two distinct and separate trademarks and the change in logos from Vanderbilt to Vanderbilt was a material change.
- At the present time, on Petitioner's website, all of the webpages display the updated logo

 Vanderbilt, and on only a few pages Petitioner places a very small depiction of the '510 mark on the very bottom and on some pages the user needs to scroll down the pages to see this small depiction. Petitioner's ABOUT VMF page, LOAN APPLICATION page, ONLINE APPLICATION page, which are the most important pages on Petitioner's website do not display the '510 logo at all. (Exhibit J, Webpages from Petitioner's Website).
- 77. A copy of a webpage which places a very small depiction of the '510 mark on the very

bottom of the page was submitted to the Trademark Office as a specimen along with its

Combined Declaration of Use and Application for Renewal. In the declaration, the attorney had
to direct the Examiner's attention to the small logo at the very bottom of the page, which
emphasizes the fact that such use is anything but prominent trademark use. (*Exhibit K*)

- 78. Such token use of a registered mark in view of Petitioner's admitted decision to update its mark is not considered use in a trademark sense and as such Petitioner has abandoned the '510 registration.
- 79. Due to the material change in the mark, the original mark as embodied in the '510 registration is deemed abandoned since its use has been discontinued in favor of the updated mark, Vanderbilt.
- 80. As such, the '510 registration is to be cancelled due to abandonment.

COUNTERCLAIM TO CANCEL REGISTRATION DUE TO FRAUDULENT SUBMISSION OF COMBINED DECLARATION OF USE AND APPLICATION FOR RENEWAL UNDER SECTION 8 & 9

- 81. Registrant repeats and re-alleges each and every allegation set forth in the foregoing paragraphs as if fully set forth herein.
- Registrant hereby seeks cancellation of Petitioner's Registration (Registration No.2,011,510) issued October 29, 1996 for the mark Vanderbilt and Design in International Class36 for the application filed April 19, 1995.
- 83. On October 29, 2015, Petitioner submitted to the United States Patent and
 Trademark Office a Combined Declaration of Use and Application for Renewal of
 Registration under Sections 8 & 9.

- 84. Petitioner submitted the signed declaration stating that "the mark is in use in commerce on or in connection with the goods/services...as evidenced by the attached specimen showing the mark as used in commerce." (Exhibit K)
- 85. The specimen is identified as a "website printout showing use of the mark for the services-see bottom left of printout." (*Exhibit K*)
- 86. On the submitted specimen, the '510 registered mark appears at the bottom of the webpage in a very small size as compared to the new updated Vanderbilt and Design

mark, Vanderbilt . (Exhibit K)

- 87. According to the Trademark Manual of Examination Procedure TMEP 1301.04(f)(i) the designation must appear sufficiently prominent on the specimen (e.g., placement, size, or stylization) so that it will be perceived by consumers as a mark. For instance, if shown in the same font, size, and color as the surrounding text on the specimen designation may not be perceived as a source indicator.
- 88. Contrary to its assertion in the Declaration, Petitioner is not presently using the '510 registered mark in a prominent display as it has phased this mark out and replaced it with the new updated Vanderbilt and Design mark which is now displayed in a large size prominently on the website.
- 89. Petitioner continues to place a small depiction of the '510 registration on the very bottom of its homepage in order to preserve its registration. However such use is considered token use as it is not displayed prominently and therefore is not perceived as a mark.

90. Petitioner submitted the sworn Declaration of Use attesting to the fact that the '510 registered mark is in use, when in fact it is not in use in a trademark sense.

91. As such, the '510 registration should be cancelled for fraudulent submission of a Declaration of Use.

WHEREFORE, Registrant prays that the Board:

- (a) deny all relief requested by Petitioner therein;
- (b) dismiss the Cancellation Proceeding with prejudice against Petitioner;
- (c) cancel Registration No. 2,011,510; and
- (d) grant Registrant such other further relief as it deems just.

Dated: July 20, 2016

Respectfully submitted,
SOFER & HAROUN, LLP
/Joseph Sofer/
Joseph Sofer, Esq.
Attorney for Registrant, TERRA
HOLDINGS, LLC
215 Lexington Ave, Suite 1301
New York, NY 10016
(212) 697-2800
(212) 697-3004 Facsimile

Certificate of Service

This is to certify that a true and correct copy of the foregoing is being served on Petitioner's counsel of record by email as follows:

Michael Bradford, Esq. Luedeka Neely 1504 Riverview Tower 900 S. Gay St. Knoxville, TN 37902 MBradford@Luedeka.com

Date: July 20, 2016 /Adina Brand/ Adina Brand

EXHIBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 76/680,503 Published on February 19, 2008		
	X	
VANDERBILT UNIVERSITY,	:	
	1	
Opposer,	:	Opposition No.
	:	
у.		
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VANDERBILT MORTGAGE AND	3	
FINANCE, INC.,		
	39	
Applicant.	:	
	15	
	X	

NOTICE OF OPPOSITION

TO THE COMMISSIONER OF TRADEMARKS:

VANDERBILT UNIVERSITY ("Vanderbilt" or "Opposer"), a corporation of the State of Tennessee headquartered at 2201 West End Avenue, Nashville, Tennessee 37235, believes that it will be damaged by the registration of Application Serial No. 76/680,503 for the designation VANDERBILT and design as a service mark filed on August 9, 2007, by Vanderbilt Mortgage and Finance, Inc. ("Applicant"), and hereby opposes the same ("Opposition").

The grounds for Opposition are as follows:

- Opposer is a private university located in Nashville, Tennessee.
- Vanderbilt University was founded in 1873 by a gift from Commodore Cornelius
 Vanderbilt for the purpose of building a university in the South to contribute to strengthening the
 ties which should exist between all sections of our common country.

- 25. Applicant's designation VANDERBILT & Design so closely resembles Opposer's Marks as to be likely, when used in connection with Applicant's proposed services, to cause confusion, to cause mistake, and to deceive with consequent injury to Opposer and the public.
- 26. Applicant's designation VANDERBILT & Design so closely resembles Opposer's Marks that potential purchasers of the services intended to be offered under Applicant's proposed mark would be likely to believe that Opposer is the source of such services, or that Opposer has authorized, sponsored, approved of, or in some other manner associated itself with the services of Applicant, thereby creating a likelihood of confusion, deception or mistake, all to the damage of Opposer.
- Applicant's designation VANDERBILT & Design falsely suggests a connection or affiliation between Opposer and Applicant therefore is not entitled to registration.
- 28. Application Serial No. No. 76/680,503 was filed on August 9, 2007, and therefore is subject to the provisions of Section 13 of the Lanham Act, 15 U.S.C. § 1063, as amended.
- 29. Applicant's use and registration of the designation VANDERBILT & Design as shown in Application Serial No. 76/680,503 will lessen the capacity of Opposer's VANDERBILT marks to distinguish Opposer's goods and services from those of others, all to the damage of Opposer.
- 30. Opposer will be damaged by the registration sought by Applicant because such registration would constitute prima facie evidence of Applicant's exclusive right to use Applicant's designation for and in connection with Applicant's services, which would be inconsistent with and detrimental to Opposer's prior, established and superior rights in Opposer's Mark.

EXHIBIT B

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Serial No. 76/680,503 Published on February 19, 2008		
	X	
	18	
VANDERBILT UNIVERSITY,	:	
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Opposer,	1:	Opposition No. 91183673
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VANDERBILT MORTGAGE AND	F1	
FINANCE, INC.,	¥.	
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Applicant.	1	
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BRIEF IN SUPPORT OF OPPOSER VANDERBILT UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Applicant Vanderbilt Mortgage and Finance, Inc. ("VMF" or "Applicant") has filed Application U.S. Serial No. 76/680,503 to register VANDERBILT & Design for financing services for purchasers of manufactured homes ("Applicant's Alleged Mark"). Vanderbilt University (the "University") has been using the mark VANDERBILT, alone and together with various designs, for numerous goods and services continuously since 1873. Applicant's application should be refused registration as a matter of law under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on grounds of likelihood of confusion with the University's VANDERBILT trademark.

sufficient that the respective goods or services "of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer." Id.

The University offers numerous financial services. Specifically, through its licensee Vanderbilt Employees Credit Union, the University has been offering financing services, including consumer loans, since 1959. The University also offers financial aid and scholarships, as well as debit card type services for students, alumni, faculty and staff. These services are closely related to the services offered by Applicant.

Even in the absence of the financial services offered by the University, the educational and athletic services offered by the University would be encountered by the same persons as the services targeted to the consumers of the services offered under Applicant's Alleged Mark, namely, financing services for purchasers of manufactured homes. The University and Applicant are so close in geographic proximity that it is inevitable that consumers of Applicant's services will mistakenly believe that they originate from or are affiliated with or sponsored by the University. Applicant's marketing of its services with the University's colors and with educational indicia also further confuse the issue.

The issue is not whether consumers will confuse the services, but rather, whether there is a likelihood of confusion as to the <u>source</u> of the service. <u>In re Rexel Inc.</u>, 223 USPQ 830 (TTAB 1984). Thus, the second <u>du Pont</u> factor, the similarity of the goods and services, also weighs in favor of the University. The services offered under Applicant's Alleged Mark are closely related to the services offered under the University's VANDERBILT Marks and are likely to be

EXHIBIT C

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Appli	cation
Serial No. 76/680,503	Published
on February 19, 2008	

Vanderbilt University,	
Opposer,)
v.) Opposition No. 9118367
Vanderbilt Mortgage and Finance, Inc.,)
Applicant.)

APPLICANT'S RESPONSE IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

In this opposition, Vanderbilt University seeks to prevent Vanderbilt Mortgage and Finance. Inc. from federally registering the VANDERBILT logo mark shown below for "financing services for purchasers of manufactured homes" in Class 36.



However, Vanderbilt Mortgage has used various forms of its VANDERBILT mark for its services for over 30 years. In 1996, the Company's VANDERBILT mark was federally registered in the form shown below for the same services listed above in Class 36.



Vanderbilt University did not contest federal registration of Applicant's VANDERBILT mark for the Company's services in 1996. This registration is now incontestable. It was renewed in 2006, and

only offered to students and faculty of the university and none of these services remotely involve financing for purchasers of manufactured homes.

E. The Evidence of Record Clearly Establishes That There is No Likelihood of Confusion

The determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Isolating three of the thirteen "du Pont factors." Opposer would have the Board find in favor of Opposer. However, as explained below, all of the DuPont factors, including the three discussed by Opposer in its motion, actually favor Applicant,

1. The Marks are Dissimilar When Viewed in Their Entireties

As stated in TMEP § 1207.01, "[t]he basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used. It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark." Citing In re National Data Corp., 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985). The marks used by Opposer and Applicant are similar only to the extent that they both use the "Vanderbilt" name. However, the words, phrases and distinctive logos used by Opposer and Applicant in conjunction with the VANDERBILT term reveal substantial differences in the marks. Opposer allegedly uses marks such as VANDERBILT. VANDERBILT COMMODORES, VANDERBILT CHILDREN'S HOSPITAL, and SIGILLUM UNIVERSITATIS VANDERBILTIAE. MDCCCLXXII., typically in conjunction with various logos and designs such as a "V" and a commodore. See Opposer's Brief, p. 5-7. Even its purported licensee uses the mark "Vanderbilt University Employees' Credit Union" instead of merely "Vanderbilt." On the other hand, Applicant's mark of the '503 Application includes a distinctive design element including a window pane and roof structure displayed above the term "Vanderbilt," which suggests Applicant's services

related to manufactured housing and not any type of higher educational services. Applicant's design element results in a mark that is uniquely different than any mark used by Opposer.

As for the design element of the VANDERBILT mark of Applicant's '503 Application, Opposer has not asserted or attempted to show that it has any rights in any marks which have any alleged similarity to the design portion of mark of the '503 Application. All of Opposer's assertions focus on the term "Vanderbilt," which Applicant has used for over thirty years, and none mention the design element of the mark of the '503 Application. Opposer's 30(b)(6) representative and Director of Trademark Licensing even testified under oath that Opposer claims no damage from the design part of Applicant's VANDERBILT Mark of the '503 Application. See Bradford Decl., Huckaba Depo., Ex. E. 182: 24 - 185: 4. As noted above. Applicant is already the owner of the incontestable '510 Registration for the VANDERBILT mark with a minimal design element and Applicant has used its VANDERBILT marks for over thirty years without conflict. Accordingly, it is apparent that Opposer has not been and cannot be damaged by Applicant's use and registration of marks containing the term "Vanderbilt." Since Opposer is not damaged by the design element of Applicant's VANDERBILT mark of Applicant's '503 Application, this case should be dismissed as a matter of law due to Applicant's ownership of the incontestable '510 Registration for substantially the same mark for identical services. The Place for Vision, Inc. v. Pearle Vision Center, Inc., 218 U.S.P.Q. 1022, 1023 (T.T.A.B. 1983); Corp. v. General Refractories Co., 162 U.S.P.Q. 47 (T.T.A.B. 1969).

2. Applicant's Services are Dissimilar to Those Offered by Applicant

Opposer's efforts to draw some viable relationship between its higher educational services and Applicant's "financing services for purchasers of manufactured homes" are "nothing more than stretching exercises designed to enlarge upon particular situations and particular facts to such an extent and to such a point that the result is a distortion of the true picture of [O]pposer's operations under its [VANDERBILT] marks, and even then they fail to bridge the gap between the parties." Quoting Aero Mayflower Transit Co., Inc. v. Snark Prods., Inc., 190 USPQ 100, 105 (TT&A Bd., 1976). "In a realistic appraisal of these [goods and services], it is apparent that none of the items so described by [O]pposer [are], in any way.

related to [financing services for purchasers of manufactured homes] of the type sold by [A]pplicant." Id.

(While the opposer argued it used its MAYFLOWER marks for a wide variety of products including numerous recreational and sporting products and the applicant used its MAYFLOWER mark for sailboats, the Board, in finding that the goods were dissimilar, stated that the opposer was primarily engaged in the transportation of household goods and the attempt by opposer to lump together goods incidental to the services opposer offered "cannot obfuscate the inherent nature, character, and purpose of the [incidental] goods.").

Opposer is primarily engaged in higher educational services. It also operates an affiliated teaching hospital and sells clothing and novelty items which are designed to promote its higher educational services and the institution's athletic teams. Opposer owns federal registrations for its VANDERBILT marks for only these types of goods and services. Opposer does not own any federal trademark registrations for VANDERBILT, or any other mark, in connection with financial services, and financial services are a radical departure from its normal activities. Opposer's citation to its financial aid program and its issuance of debit cards to faculty and students as part of a meal plan in attempting to demonstrate that Opposer is somehow involved in financial services similar to those of Applicant is an imaginative but obvious exercise in semantics. These are simply normal and expected services offered by a higher education institution and are not similar to Applicant's financing services relating to manufactured homes.

Additionally, there is a significant difference between the consumers of Applicant's services as compared to the consumer's of Opposer's services. Consumers of Applicant's services are generally older homebuyers with families of their own whereas consumers of Opposer's services are generally young college-aged students. Students are not typically homebuyers because they often do not know where they will live and work after they finish school, they do not have the necessary income to make a down payment towards the purchase of a home, and they do not have families of their own. Instead, students almost always live in dorms, apartments close to campus, or with their parents. The services offered by Applicant and Opposer are unrelated and are offered to completely different sets of consumers.

Finally. Opposer's citation to the Credit Union's use of VANDERBILT UNIVERSITY EMPLOYEES' CREDIT UNION for certain banking services does not suffice to allow Opposer to claim it has offered financing services relating to manufactured homes. As described above, Opposer and the Credit Union did not enter into a licensing agreement until August 2008. Therefore, Applicant's filing date for the mark at issue predates any rights Opposer may have gained from the credit union by over a year and Applicant's use of marks containing the "Vanderbilt" term for financing services relating to manufactured homes predates the license by decades. See Heaton Enterprises of Nevada Inc. v. Lang. 7 USPQ2d 1842, 1849 n. 24 (TTAB 1988)(licensee's use of a mark prior to entering a license agreement does not inure to the benefit of the licensor). Accordingly, the Credit Union's services are of no moment.

Even if the Credit Union's services were relevant, the Credit Union does not offer any financing services related to manufactured homes. As described above, it only offers home equity lines of credit, checking accounts, saving accounts, unsecured loans, and secured loans with a limited amount of allowed collateral, which does not include manufactured homes. As for the home equity lines of credit and checking accounts offered by the Credit Union, they were first offered by the Credit Union well after Applicant adopted its VANDERBILT marks and are therefore irrelevant. Also, the only potential members of the Credit Union are not the general public, but the faculty and staff of Vanderbilt University and the Vanderbilt University Medical Center. The differences between the relevant purchasers in such a case are even more significant. It is highly unlikely that one of Opposer's own employees would be confused by Applicant's use of its VANDERBILT marks for financing services for purchasers of manufactured homes.

Accordingly, the differences between the services offered by Applicant and Opposer weigh in favor of Applicant.

3. Opposer's and Applicant's Established, Likely-to-Continue Trade Channels are Dissimilar

Applicant's services are primarily offered through manufactured home dealerships located throughout the country. See Krupacs Decl., ¶10. Opposer is primarily an educational institution and

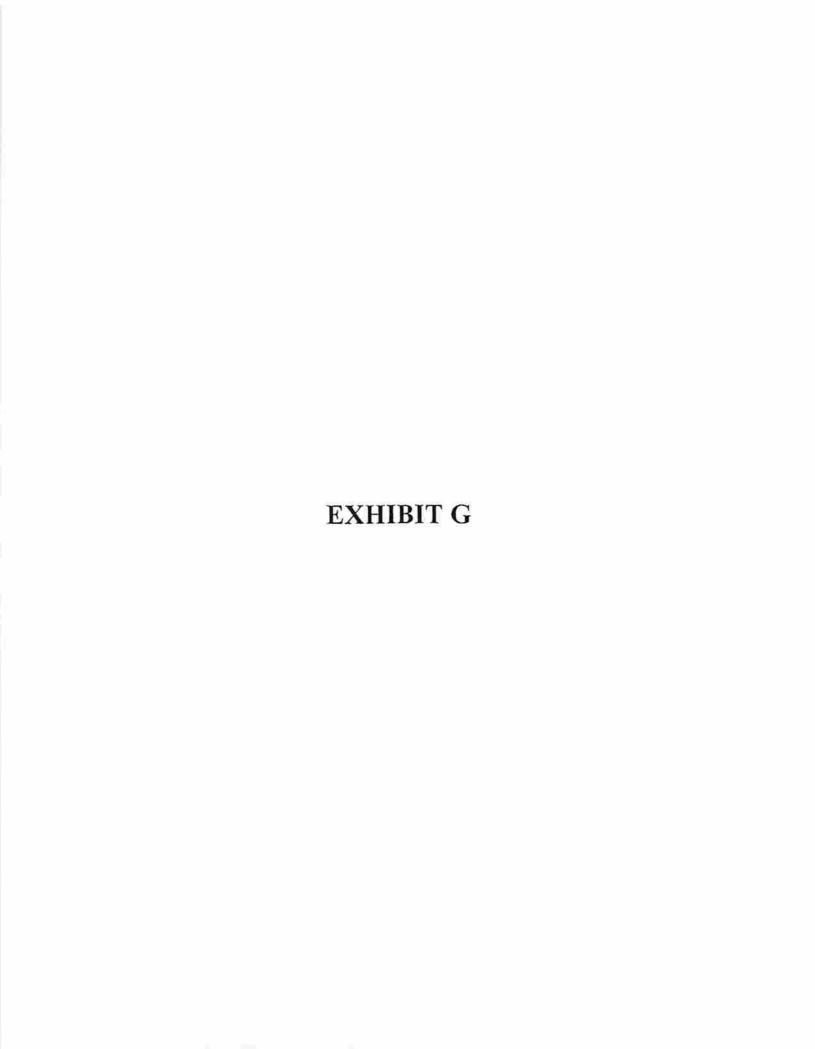
The inherent weakness of the VANDERBILT term as a surname has been admitted by Opposer. In this regard, in at least the prosecution of the applications that issued as U.S. Registration No. 2.778.959, for the term VANDERBILT in block letters, and No. 2.746,009 for the VANDERBILT mark with minimal stylization in a stylized arched format, both of which are asserted by Opposer in this case. Opposer changed its filing basis to seek registration under 2(f). Where "an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact." Yamaha Intern. Corp. v. Hoshino Gakki Co., Ltd., 840 F.2d 1572, 1577 (Fed. Cir. 1988): T.M.E.P. Accordingly, Opposer has admitted that the VANDERBILT mark is merely descriptive and therefore inherently a weak mark. If anything, Opposer's VANDERBILT mark is not famous. Accordingly, this factor strongly favors Applicant.

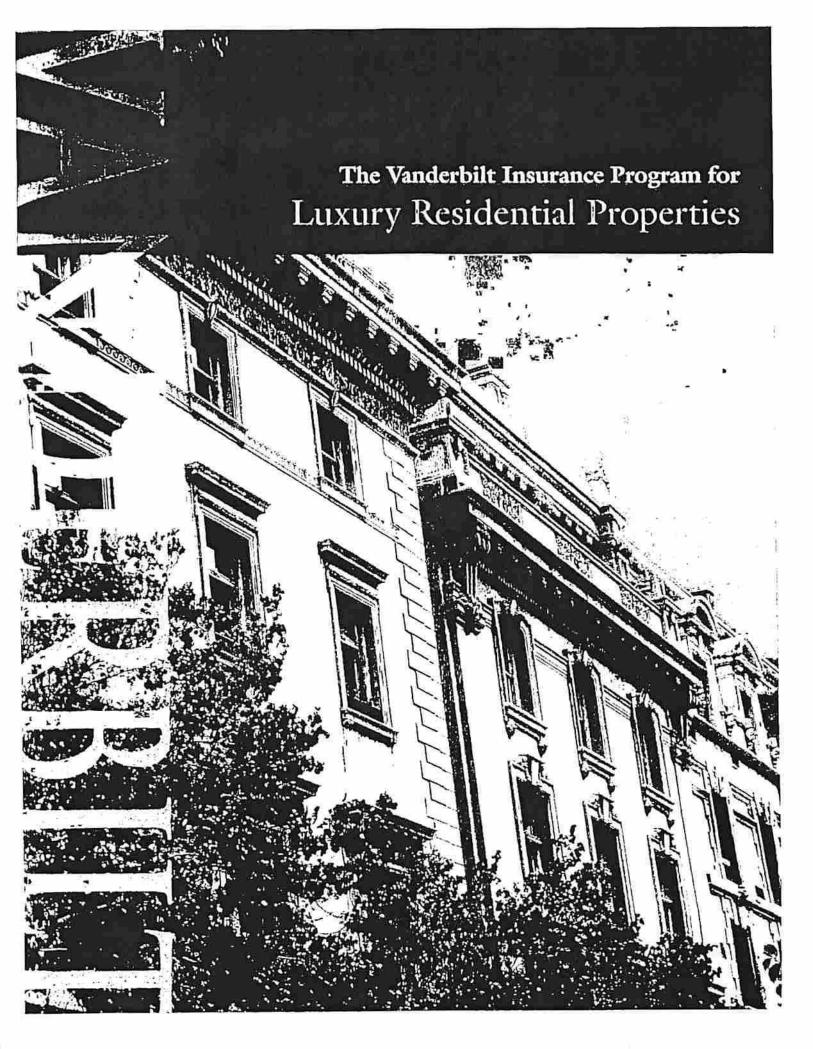
6. There is Significant Third Party Usage of the "Vanderbilt" Name

As further evidence that Opposer's VANDERBILT mark is not famous, there are at least thirtyseven (37) federal registrations and two (2) pending applications for marks containing the term
"Vanderbilt" that are owned by entities or individuals other than Applicant and Opposer for a variety of
goods and services. See Bradford Decl., Ex. F. For example, one registration is for the mark
VANDERBILT SECURITIES, LLC and design for "financial services, namely, investment brokerage."
Furthermore, there is significant common law usage, including eleven (11) entities that do not have
federal registrations in which Opposer successfully subpoenaed documents from that offered financial,
home construction, or similar services under a mark containing the term "Vanderbilt." See Bradford
Decl., Ex. G.⁵ Additionally, a simple search on the Google search engine reveals dozens, if not hundreds,
of other entities using various VANDBERBILT names and marks for a vast array of goods and services.
In view of the significant third-party uses of "Vanderbilt" marks, it is reasonable to conclude that
consumers have become conditioned to recognize that many entities use such terms. See Carefirst of
Maryland, 77 USPQ2d at 1510. "Thus, consumers likely are able to distinguish between entities based on

⁵ Applicant intends to prove up the third party use by the registrants and common law users by way of depositions on written questions during its testimony period.

EXHIBIT D





UXURY CO-OP AND CONDO BUILDINGS HAVE INSURANCE NEEDS AND CONCERNS THAT PUT THEM IN A CLASS BY THEMSELVES. THE VANDERBILT INSURANCE PROGRAM SPECIALIZES IN MEETING THOSE NEEDS. WITH OUR RESOURCES, EXPERTISE AND DEDICATION TO PERSONAL SERVICE, WE PROVIDE THE BEST POSSIBLE INSURANCE COVERAGE-IN TERMS OF QUALITY, SERVICE AND PRICE. WE INVITE YOU TO CONTACT US TO DETERMINE IF YOUR BUILDING QUALIFIES FOR OUR PROGRAM SO THAT YOU CAN ENJOY THE PEACE OF MIND THAT ONLY VANDERBILT CAN GIVE YOU.

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 - The technical support and in-house systems to put your program into action
 - The claims experience including in-house counsel to handle your claims in a proactive manner
 - The dedication to personal attention that allows us to understand and maintain your program at the comprehensive level

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Vanderbilt places insurance with only A.M. Best A-rated carriers, providing the broadest available coverage. This protection includes:

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- · Directors & Officers Coverage

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- · Comprehensive crime including managing agents
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- · Enhanced Coverage terms
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- Lower rates
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- · No sharing of limits

We maintain this level of protection by carefully screening every potential participant in our program. If your building qualities, we offer you the opportunity to join our RPG and benefit from the extraordinary advantages of Vanderbilt's Insurance Program.

EXHIBIT E

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

on February 19, 2008	
Vanderbilt University,	
Opposer,)
V.) Opposition No. 91183673
Vanderbilt Mortgage and Finance, Inc.,	
Applicant.	

In the Matter of Application Serial No. 76/680.503 Published

MOTION FOR SUMMARY JUDGMENT

Pursuant to 37 C.F.R. §§ 2.126 and 2.127, Applicant, by and through its counsel of record, hereby moves for summary judgment under Fed. R. Civ. P. 56 that this opposition be dismissed with prejudice.

As discussed in more detail in the attached Memorandum, the Notice of Opposition seeks to block registration of the mark VANDERBILT and Design of U.S. Application Serial No. 76/680,503, for "financing services for purchasers of manufactured homes." However, the VANDERBILT mark of Applicant's '503 application is substantially similar to the VANDERBILT mark of U.S. Registration No. 2,011,510 issued to Applicant in 1996 for the same services. Since the VANDERBILT mark of the opposed application and the VANDERBILT mark of Applicant's 1996 registration are substantially the same and are registered or sought to be registered for the same services, Applicant submits that Opposer would not be damaged by registration of the VANDERBILT mark of the opposed application and respectfully requests that its motion be granted, that the opposition be dismissed, with prejudice,

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

pposition No. 91183673
)

In the Matter of Application Serial No. 76/680,503 Published

MEMORANDUM IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT

In this opposition, Vanderbilt University seeks to prevent Vanderbilt Mortgage and Finance, Inc. from federally registering the VANDERBILT mark shown below for "financing services for purchasers of manufactured homes" in Class 36.



However, Vanderbilt Mortgage has used various forms of its VANDERBILT mark for its services for over 30 years. In 1996, the Company's VANDERBILT mark was federally registered in the form shown below for the same services listed above in Class 36.



The '510 registration and the VANDERBILT mark thereof are subject to and entitled to all of the rights, benefits, and presumptions of the Trademark Act in terms of the validity, use, ownership, enforceability, notice, and the like of the VANDERBILT mark and of the registration.

The VANDERBILT mark of the '510 registration is presently used by Vanderbilt Mortgage in commerce for and in connection with the services set forth in the '510 registration.

Id. Opposer did not oppose the application which issued as the '510 registration, nor has Opposer sought to cancel the '510 registration, and Opposer has not otherwise challenged Applicant's ownership of the '510 registration or any of Applicant's statutory rights, benefits, privileges, and presumptions afforded thereby.

In 2006, Clayton and its affiliates made a strategic decision to update certain marks used by the companies, including the VANDERBILT mark. Vanderbilt Mortgage began using an updated version of the VANDERBILT mark in commerce at least as early as April 3, 2007, and has continued using the mark to the present. U.S. Application Serial No. 76/680,503 ("the '503 Application") was filed on August 9, 2007, seeking registration for this updated version of the VANDERBILT mark, shown below, for the identical services as those listed in the company's '510 registration, namely "financing services for purchasers of manufactured homes" in Class 36. *Id.* ¶ 8.



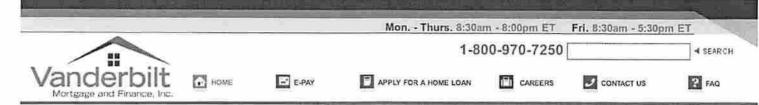
The '503 application claims ownership of the VANDERBILT mark of the '510 registration and of the '510 registration in accordance with T.M.E.P § 812, which claim is of record in the application proceedings and was not refused by the Examining Attorney. The '503

application was examined on the merits without controversy. No prior pending or registered mark of any other party was cited against registration of the VANDERBILT mark of the '503 application under 15 U.S.C. § 1052(d). Notice of publication of the mark was mailed on January 30, 2008, indicating that the mark would be published for opposition on February 19, 2008.

The VANDERBILT mark of the '503 application was duly published for opposition on February 19, 2008, and this proceeding followed, commencing with a Notice of Opposition filed April 21, 2008, after a 30 day extension of time was granted to Opposer. Following issuance of the Service Notice on April 21, 2008, Applicant answered the Notice of Opposition on May 30, 2008, denying the salient allegations of the Notice and raising various affirmative and other defenses including, among other things, laches, res judicata, collateral estoppel, lack of damage, and ownership of '510 registration issued in 1996 for Applicant's VANDERBILT mark as shown therein and currently in force for the very same services as those set forth in the '503 application.

As will become more evident hereinafter, Applicant contends that this Opposition is not well taken and must fail as a matter of law because Opposer would not be damaged by registration of the VANDERBILT mark of the '503 application. Opposer did not and cannot now contest the '510 registration for Applicant's substantially similar VANDERBILT mark for the same services. As explained by the court in *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 160 U.S.P.Q. 715 (CCPA 1969) and in many subsequent decisions of this Honorable Board, an opposition should be summarily dismissed when it is shown that the registration being opposed is being sought for a mark that is substantially the same as a mark already incontestably registered by the Applicant for the same or substantially the same goods or services. If the Opposer is not damaged by the mark already registered, it stands to reason it

EXHIBIT F





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EXHIBIT G

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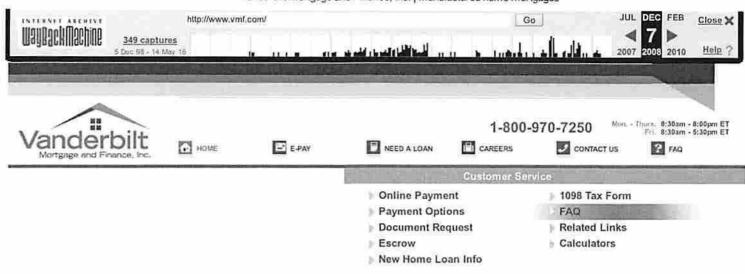
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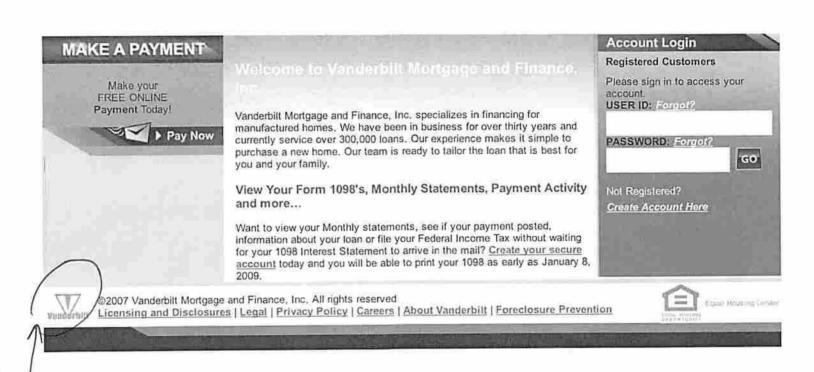
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EXHIBIT H

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Vanderbilt University,	
Opposer,	
v.	Opposition No. 91183673
Vanderbilt Mortgage and Finance, Inc.,	
Applicant.	

ANSWER AND DEFENSES TO NOTICE OF OPPOSITION

Vanderbilt Mortgage and Finance, Inc. ("Applicant") hereby responds to the Notice of Opposition ("Notice") of Vanderbilt University ("Opposer") as follows:

- 1. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the preamble of the Notice and of paragraph 1 thereof, and therefore denies the same. Additionally, Applicant denies that Opposer will be damaged by registration of the mark VANDERBILT and Design of Application Serial No. 76/680,503 on the Principal Register of the USPTO.
- Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the Notice and therefore denies the same.
- Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3 of the Notice and therefore denies the same.
- Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4 of the Notice and therefore denies the same.

- 15. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of the Notice and therefore denies the same.
- 16. Applicant admits that the claimed date of first use of the mark VANDERBILT and Design shown in Applicant's U.S. Trademark Application Serial No. 76/680,503 ("the '503 application") is at least as early as April 3, 2007. However, Applicant has used various other marks containing the term VANDERBILT as the dominant portion thereof for over thirty years, including use of the incontestably federally registered VANDERBILT & Design mark of U.S. Registration No. 2,011,510 ("the '510 registration") in commerce substantially continuously since at least as early as 1977 for the services stated therein (the above collectively referred to as Applicant's "VANDERBILT Marks"). Applicant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 16 of the Notice and therefore denies the same.
- 17. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 of the Notice and therefore denies the same.
- 18. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18 of the Notice and therefore denies the same.
- 19. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 of the Notice and therefore denies the same.
- 20. Applicant denies that Opposer is entitled to a scope of protection for its alleged VANDERBILT marks sufficient to cause Opposer to be damaged by registration of Applicant's VANDERBILT and Design mark of the opposed application for the services stated therein or to

EXHIBIT I

THIS DISPOSITION IS NOT A PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE Trademark Trial and Appeal Board P.O. Box 1451 Alexandria, VA 22313-1451

WINTER

Mailed: May 11, 2010
Opposition No. 91183673
Vanderbilt University

v.

Vanderbilt Mortgage and Finance, Inc.

Before Bucher, Zervas, and Mermelstein, Administrative Trademark Judges.

By the Board:

Vanderbilt Mortgage and Finance, Inc. (hereafter "applicant") seeks to register the mark shown below for "financing services for purchasers of manufactured homes."



Vanderbilt University (hereafter "opposer") opposes
registration of the applied-for mark on the grounds of
deceptiveness and false suggestion of a connection, priority
and likelihood of confusion, and dilution. In support of its

Application Serial No. 76680503, filed August 9, 2007, based on applicant's alleged use in commerce, claiming April 3, 2007 as its date of first use anywhere and date of first use in commerce.

design of the applied-for mark brings to mind an image that is suggestive of a home. These are not trifling differences, requiring "careful inspection to detect them." Morehouse, 160 USPQ at 717. Because each mark projects a different commercial impression, sounds different and has a distinctly different appearance, there is no genuine issue of material fact that applicant's applied-for mark does not evoke essentially the same, continuing commercial impression as applicant's previously registered trademark. See O-M Bread, 36 USPQ2d at 1045.

Applicant also argues that its marks should be considered to be substantially identical because opposer's claims of damage relate solely to the presence of the term "VANDERBILT" in applicant's applied-for mark and not to the design portion of said mark. Applicant's argument is unavailing inasmuch as it implicitly requests that the Board focus on a single element of said marks, rather than on whether the marks project substantially the same image and symbolize a single and continuing commercial impression. See S & L Acquisition Co. v. Helen Arpels Inc., 9 USPQ2d 1221, 1226 (TTAB 1987).

⁵ Note that the *Morehouse* standard is not the same as that used when comparing marks for purposes of a likelihood of confusion analysis. While the latter test requires balancing of a variety of factors, see In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (Fed. Cir. 1973), it is clear that a likelihood of confusion may be found even when the marks at issue are not "essentially the same."

Opposition No. 91183673

In view of the foregoing, we find that there are no genuine issues of material fact at issue, and that, as a matter of law, that applicant's marks are not essentially the same and that applicant's prior registration defense is not applicable in this case.

Accordingly, applicant's motion for summary judgment is denied insofar as applicant has failed to establish that it may rely on the Morehouse defense and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

Rather, we hereby enter partial summary judgment sua sponte in opposer's favor on the issue of whether its claims are barred by the Morehouse defense based on Registration No. 2011510.8

See, e.g., Tonka Corp. v. Tonka Tools, Inc., 229 USPQ 857, 858 (TTAB 1986); and Visa Int'l Serv. Ass'n v. Life-Code Syst., Inc., 220 USPQ 740, 744 (TTAB 1983). See also TBMP § 528.08

cancellation under Section 2(a) of the Trademark Act is not persuasive inasmuch as applicant's prior registration is not the subject of a cancellation proceeding by opposer. Cf. Estate of Biro v. Bic Corp., 18 USPQ2d 1382, 1834 (TTAB 1991) ("Inasmuch as opposer has now filed a petition to cancel the prior registration, ... applicant's "Morehouse" defense must fail ... [and] applicant's motion for summary judgment grounded on this defense is denied").

The parties should note that evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. See, e.g., Levi Strauss & Co. v. R. Joseph Sportswear Inc., 28 USPQ2d 1464 (TTAB 1993).

Entremote that our decision granting partial summary judgment is interlocutory in nature and may not be appealed until a final decision is rendered in these proceedings. See Copeland's Enterprises Inc. v. CNV Inc., 887 F.2d 1065, 12 USPQ2d 1562 (Fed. Cir. 1989).

EXHIBIT J



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1

Social Security number of applicant and coapplicant (if applicable)

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Current employment and income information

4 Pick out your home and close on your loan.

Get Started

5 Move into your new home!

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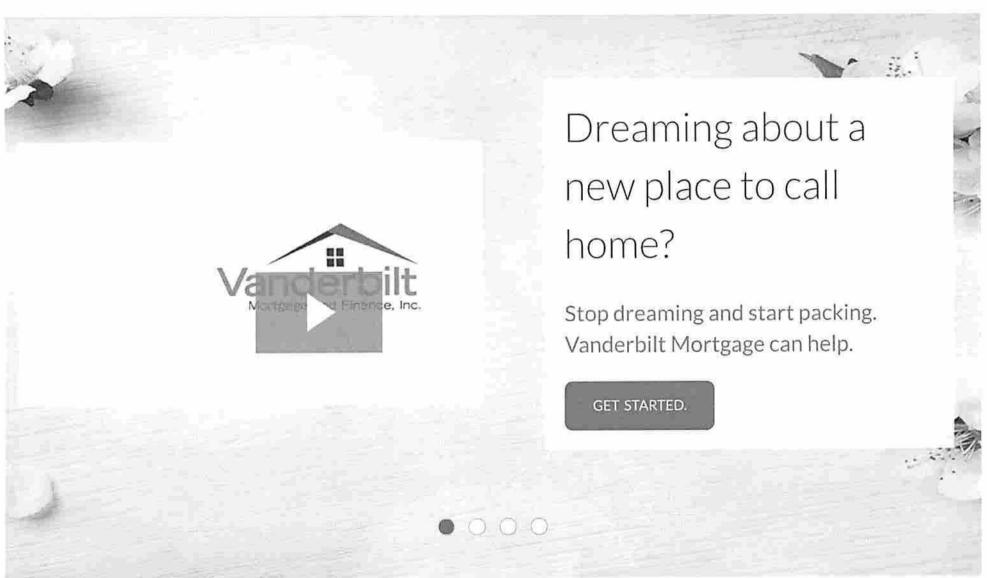
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	FHA Mort sponsored loan offers	FHA Mortgage - Low down payment requirements. The Federal Housing Administration (FHA) loan, sponsored by the federal government, is designed to help first-time homebuyers qualify for a loan. An FHA loan offers a competitive rate and a low down payment.	quirements. The Feder designed to help first-tir own payment.	ral Housing Administrati me homebuyers qualify	on (FHA) Ioan, or a Ioan. An FHA

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7/15/2016

EXHIBIT K

Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9

The table below presents the data as entered.

Input Field	Entered
REGISTRATION NUMBER	2011510
REGISTRATION DATE	10/29/1996
SERIAL NUMBER	74663326
MARK SECTION	
MARK	VANDERBILT (stylized and/or with design)
ATTORNEY SECTION (current)	
NAME	Michael J. Bradford
FIRM NAME	LUEDEKA NEELY GROUP PC
INTERNAL ADDRESS	900 SOUTH GAY STREET SUITE 1871
STREET	RIVERVIEW TOWER
CITY	KNOXVILLE
STATE	Tennessee
POSTAL CODE	37902
COUNTRY	United States
EMAIL	mbradford@luedeka.com
DOCKET/REFERENCE NUMBER	49478.001419
ATTORNEY SECTION (proposed)	
NAME	Michael J. Bradford
FIRM NAME	LUEDEKA NEELY GROUP PC
STREET	P.O. Box 1871
СІТҮ	KNOXVILLE
STATE	Tennessee
POSTAL CODE	37901
COUNTRY	United States
PHONE	865-546-4305
FAX	865-523-4478
EMAIL	mbradford@lucdeka.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
DOCKET/REFERENCE NUMBER	49478.00

CORRESPONDENCE SECTION (current)	
NAME	MICHAEL J BRADFORD
FIRM NAME	LUEDEKA NEELY GROUP PC
INTERNAL ADDRESS	900 SOUTH GAY STREET SUITE 1871
STREET	RIVERVIEW TOWER
CITY	KNOXVILLE
STATE	Tennessee
POSTAL CODE	37902
COUNTRY	United States
EMAIL	mbradford@luedeka.com
DOCKET/REFERENCE NUMBER	49478.001419
CORRESPONDENCE SECTION (proposed)	
NAME	Michael J. Bradford
FIRM NAME	LUEDEKA NEELY GROUP PC
STREET	P.O. Box 1871
CITY	KNOXVILLE
STATE	Tennessee
POSTAL CODE	37901
COUNTRY	United States
PHONE	865-546-4305
FAX	865-523-4478
EMAIL	mbradford@luedeka.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	Yes
DOCKET/REFERENCE NUMBER	49478.00
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	036
GOODS OR SERVICES	financing services for purchasers of manufactured homes
SPECIMEN FILE NAME(S)	
ORIGINAL PDF FILE	SPN0-50240100229-20151029104859513671 4947800- specimen-2015.pdf
CONVERTED PDF FILE(S) (1 page)	\\\TICRS\EXPORT16\IMAGEOUT16\746\633\74663326\xm12\S890002.JPG
SPECIMEN DESCRIPTION	website printout showing use of the mark for the services - see bottom left of printout
OWNER SECTION (current)	
NAME	VANDERBILT MORTGAGE AND FINANCE, INC.
STREET	500 ALCOA TRAIL
CITY	MARYVILLE
STATE	Tennessee

ZIP/POSTAL CODE	37804	
COUNTRY	United States	
LEGAL ENTITY SECTION (current)		
ТУРЕ	corporation	
STATE/COUNTRY OF INCORPORATION	Tennessee	
PAYMENT SECTION		
NUMBER OF CLASSES	I I	
NUMBER OF CLASSES PAID	1	
SUBTOTAL AMOUNT	400	
TOTAL FEE PAID	400	
SIGNATURE SECTION		
SIGNATURE	/mjb/	
SIGNATORY'S NAME	Michael J. Bradford	
SIGNATORY'S POSITION	Attorney of Record, Tennessee bar member	
DATE SIGNED	10/29/2015	
SIGNATORY'S PHONE NUMBER	865-546-4305	
PAYMENT METHOD	сс	
	FILING INFORMATION	
SUBMIT DATE Thu Oct 29 10:55:26 EDT 2015		
TEAS STAMP	USPTO/S08N09-XX.XXX.X XX-20151029105526872473-2 011510-5407841cba55b509f4 4acba2ce4317c18fc599ac9c6 c414d014017b2e5f3e-CC-108 94-20151029104859513671	

Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9

To the Commissioner for Trademarks:

REGISTRATION NUMBER: 2011510 REGISTRATION DATE: 10/29/1996

MARK: (Stylized and/or with Design, VANDERBILT)

The owner, VANDERBILT MORTGAGE AND FINANCE, INC., a corporation of Tennessee, having an address of

500 ALCOA TRAIL

MARYVILLE, Tennessee 37804

United States

is filing a Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9.

For International Class 036, the mark is in use in commerce on or in connection with all goods/services, or to indicate membership in the collective membership organization, listed in the existing registration for this specific class: financing services for purchasers of manufactured homes; or, the owner is making the listed excusable nonuse claim.

The owner is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in this class, consisting of a(n) website printout showing use of the mark for the services - see bottom left of printout.

Original PDF file:

SPN0-50240100229-20151029104859513671 . 4947800-specimen-2015.pdf

Converted PDF file(s) (1 page)

Specimen File1

The registrant's current Attorney Information: Michael J. Bradford of LUEDEKA NEELY GROUP PC

900 SOUTH GAY STREET SUITE 1871

RIVERVIEW TOWER

KNOXVILLE, Tennessee (TN) 37902

United States

The docket/reference number is 49478.001419.

The registrant's proposed Attorney Information: Michael J. Bradford of LUEDEKA NEELY GROUP PC

P.O. Box 1871

KNOXVILLE, Tennessee (TN) 37901

United States

The docket/reference number is 49478.00.

The Other Appointed Attorney(s): Stephen D. Adams, David E. Larose, Robert O. Fox, Richard W. Barnes, J. David Gonce, Mark P. Crockett, Wade R. Orr, Andrew S. Neely.

The phone number is 865-546-4305.

The fax number is 865-523-4478.

The email address is mbradford@luedeka.com.

The registrant's current Correspondence Information: MICHAEL J BRADFORD of LUEDEKA NEELY GROUP PC

900 SOUTH GAY STREET SUITE 1871

RIVERVIEW TOWER

KNOXVILLE, Tennessee (TN) 37902

United States

The docket/reference number is 49478.001419.

The registrant's proposed Correspondence Information: Michael J. Bradford of LUEDEKA NEELY GROUP PC

P.O. Box 1871

KNOXVILLE, Tennessee (TN) 37901

United States

The docket/reference number is 49478.00.

The phone number is 865-546-4305.

The fax number is 865-523-4478.

The email address is mbradford@luedeka.com.

A fee payment in the amount of \$400 will be submitted with the form, representing payment for 1 class(es), plus any additional grace period fee, if necessary.

Declaration

Section 8: Declaration of Use and/or Excusable Nonuse in Commerce

Unless the owner has specifically claimed excusable nonuse, the mark is in use in commerce on or in connection with the goods/services, or to indicate membership in the collective membership organization identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce.

The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this submission, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

Section 9: Application for Renewal

The registrant requests that the registration be renewed for the goods/services/collective organization identified above.

Signature: /mjb/ Date: 10/29/2015 Signatory's Name: Michael J. Bradford

Signatory's Position: Attorney of Record, Tennessee bar member

Signatory's Phone Number: 865-546-4305

Mailing Address (current): LUEDEKA NEELY GROUP PC RIVERVIEW TOWER

KNOXVILLE, Tennessee 37902

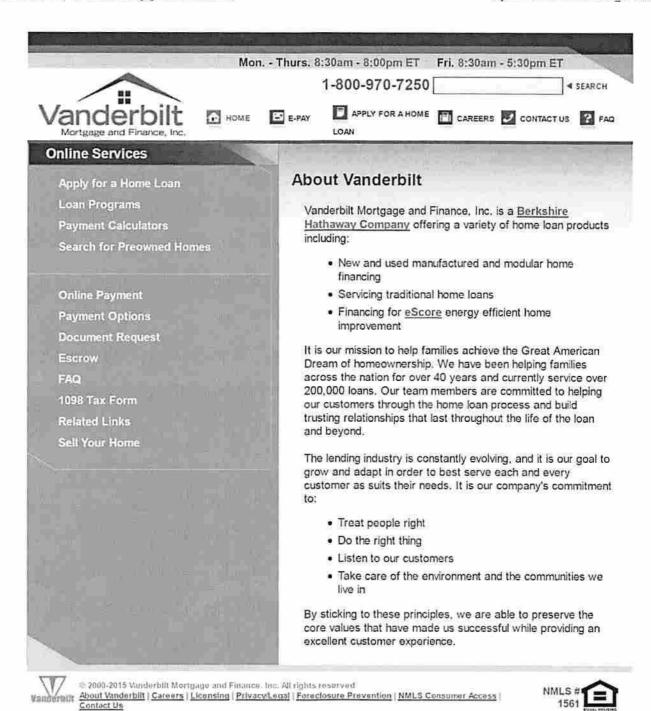
Mailing Address (proposed): LUEDEKA NEELY GROUP PC P.O. Box 1871 KNOXVILLE, Tennessee 37901

Serial Number: 74663326

Internet Transmission Date: Thu Oct 29 10:55:26 EDT 2015 TEAS Stamp: USPTO/S08N09-XX.XXX.XXX.XXX-201510291055

26872473-2011510-5407841cba55b509f44acba 2cc4317c18fc599ac9c6c414d014017b2e5f3c-C

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